

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROGER PAYNE)	
Claimant)	
)	
VS.)	
)	
YOUNG'S WELDING, INC.)	
Respondent)	Docket No. 1,035,853
)	
AND)	
)	
LIBERTY INSURANCE CORP.)	
Insurance Carrier)	

ORDER

Claimant requested review of the December 30, 2008 Award by Special Administrative Law Judge Jerry Shelor. The Board heard oral argument on April 7, 2009.

APPEARANCES

Angela D. Trimble of Pittsburg, Kansas, appeared for the claimant. Andrew Wimmer of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The original transcript of the Deposition of Edward J. Prostic, taken March 24, 2008, was filed with the Wichita office of the Division of Workers Compensation on April 7, 2008, but thereafter was lost. The evidentiary record forwarded to the Board included a copy of Dr. Prostic's deposition but that copy did not include the four exhibits offered at that deposition. The parties have provided the Board with copies of the four exhibits to Dr. Prostic's deposition and agree that they are part of the evidentiary record. Ex. 1 is Dr. Edward J. Prostic's Curriculum Vitae; Ex. 2 is Dr. Prostic's October 9, 2007 Medical Report; Ex. 3 is a letter dated February 22, 2008, from Dr. Prostic to Angela D. Trimble; and Ex. 4 is an itemization of medical bills for Roger Payne.

ISSUES

The Special Administrative Law Judge (SALJ) found that claimant did not provide timely notice of his accidental injury and therefore denied benefits.

Claimant requests review of the following: (1) whether claimant's accidental injury arose out of and in the course of employment; (2) whether claimant gave timely notice; (3) average weekly wage; (4) whether claimant is entitled to temporary total disability benefits as well as unauthorized and future medical; (5) whether claimant is entitled to the payment of medical bills and mileage; and, (6) nature and extent of disability, if any. Claimant argues he is entitled to a 15 percent functional impairment based on Dr. Prostic's rating as well as temporary total disability benefits from June 29, 2007 through August 13, 2007. Claimant further argues he is entitled to the payment of medical bills and reimbursement for medical mileage.

Respondent argues claimant did not provide timely notice and therefore the SALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant is a supervisor in respondent's RV division where frames are built. On Friday, March 23, 2007, he alleged that as he was performing an inspection on an RV he received a phone call and as he straightened up to answer that call he hit his head on the hitch on the RV. He stated that he jammed his neck.

The accident allegedly occurred within 15 minutes of the end of the workday. Claimant did not report the accident to his supervisor. Claimant testified that he thought if he went home and used a heating pad or took a hot bath that he would feel better. The following day claimant drove from Southeast Kansas to Topeka to pick up a car he had purchased on E-bay. On the way home the pain in his neck increased and he stopped to spend the night at a motel.

On Monday, March 26, 2007, claimant sought medical treatment for his neck pain with Dr. Falk, a chiropractor. Claimant provided Dr. Falk with a history that he had slept on a horrible mattress at a cheap hotel two days before and had awakened with pain in his shoulder that seemed to come from the base of his neck. After three treatments, Dr. Falk referred claimant to Dr. Roger Misasi. On April 9, 2007, Dr. Misasi examined and evaluated claimant. Claimant received two epidural steroid injections into his cervical spine and then was referred to an orthopedic surgeon, Dr. Greg Wilson. Claimant initially gave Dr. Wilson a history of sleeping in a motel and waking up in pain the next morning. Claimant later told Dr. Wilson that he was hurt on the job. Dr. Wilson ordered an MRI of claimant's spine and an EMG. On June 29, 2007, Dr. Wilson performed an anterior cervical discectomy and fusion on claimant's neck.

As claimant received medical treatment he continued working for respondent until June 28, 2007. He had surgery on June 29, 2007, and continued off work until released to return to work without restrictions on August 13, 2007.

On July 7, 2007, claimant mailed an accident report to respondent. Herman Colvin, respondent's human resources safety director, confirmed receipt of the accident report from claimant on July 9, 2007. Mr. Colvin testified that it was not until receipt of the accident report that he was aware claimant was alleging a work-related accidental injury. And Mr. Colvin noted that although his work required daily interaction with claimant, nonetheless, in the time period before receipt of the accident report the claimant had never mentioned to Mr. Colvin that his neck had been injured at work.

Claimant had been through training regarding respondent's policy on reporting work-related injuries and he understood that an accident report should be turned in as soon as reasonably possible. And he noted that as a supervisor he understood that if someone got hurt he was to turn in an accident report.

Claimant later testified that he did not initially claim a work-related injury because there were two other employees who had shoulder surgery for work-related injuries and "for one reason or another, they don't work there any longer."¹ But claimant agreed that in the past he had filed a workers compensation claim with respondent for a right shoulder injury. Claimant had reported that injury to his supervisor, received treatment and ultimately received a settlement for that claim.

K.S.A. 44-520 provides:

Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

¹ R.H. Trans. at 24.

When claimant filed his E-1 Application for Hearing with the Division of Workers Compensation he alleged injury on March 16, 2007, and continuing each and every day until June 28, 2008. At the regular hearing, claimant amended the date of accident to March 23, 2007, continuing through June 28, 2007.

Claimant testified that he suffered a distinct injury to his neck that allegedly occurred on March 23, 2007. He further testified that between March 23, 2007 and June 28, 2007, he did not injure his neck other than the incident where he raised up and hit the hitch on March 23, 2007. The claimant continued working until his surgery on June 29, 2007, but never testified that work made his neck condition worsen. And the only physician who testified attributed claimant's condition to the single distinct traumatic injury without mention of any aggravation to claimant's neck as he continued working.

Claimant argues that he suffered repetitive injuries as he continued working after March 23, 2007, until he left work for his surgery. The SALJ concluded that even if claimant suffered repetitive injuries through his last day worked on June 28, 2007, his notice on July 9, 2007 would not be timely. The Board disagrees. The method of computing the 10 days to provide notice to respondent requires that intermediate Saturdays, Sundays and legal holidays are to be excluded from the computation.² Consequently, if claimant suffered repetitive injuries through his last day worked on June 28, 2007, the notice provided respondent on July 9, 2007, would be within 10 days and timely.

However, the preponderance of the evidence does not support claimant's contention that he suffered repetitive injuries as he continued working after March 23, 2007. Claimant testified that he was injured in the single discrete incident and never mentioned that his neck condition worsened as he continued working. Likewise, Dr. Prostic attributed claimant's cervical condition to the single work-related incident and never mentioned any aggravations to that condition as claimant continued working. Consequently, the Board finds claimant failed to meet his burden of proof that he suffered repetitive injuries to his neck as he continued working after March 23, 2007.

Claimant alleged a discrete traumatic injury on March 23, 2007. He was aware of the requirement to provide notice to a supervisor that he had suffered a work-related injury. Claimant inferred that he did not provide notice of his injury because he feared it would impact on his employment status. But he had filed a workers compensation claim against respondent in the past which had no adverse impact on his employment.

A notice of accident provided to respondent on July 9, 2007, for an alleged work-related accidental injury on March 23, 2007, does not meet the requirements of K.S.A. 44-

² *McIntyre v. A. L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996), K.S.A. 44-551(b)(1).

520. Consequently, a proceeding for compensation cannot be maintained. The Board affirms the SALJ's denial of benefits because claimant failed to provide timely notice of his accident.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Special Administrative Law Judge Jerry Shelor dated December 30, 2008, is affirmed but for the foregoing reasons.

IT IS SO ORDERED.

Dated this _____ day of April 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Angela D. Trimble, Attorney for Claimant
Andrew Wimmer, Attorney for Respondent and its Insurance Carrier
Jerry Shelor, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge